MOTION FILED
MAR 8 1979

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

No. 78-25

BERNADINE ROSE BROKENLEG,

Petitioner,

v.

BERNARD C. BUTTS, SR., *et ux.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CIVIL APPEALS OF THE STATE OF TEXAS, EL PASO

MOTION FOR LEAVE TO PROCEED *AMICI CURIAE* BY THE NATIONAL INDIAN YOUTH COUNCIL., INC., CROW TRIBE OF INDIANS OF MONTANA, ONEIDA NATION OF NEW YORK AND BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

(additional Amici appear inside)

ELLEN W. LEITZER

NATIONAL INDIAN YOUTH
COUNCIL, INC.
201 Hermosa, N.E.
Albuquerque, New Mexico 87108

Attorney for Amici Curiae

Washington, D.C. • THIEL PRESS • (202) 638-4621

ADDITIONAL AMICI

SISSETON-WAHPETON SIOUX TRIBE OF
NORTH DAKOTA AND SOUTH DAKOTA

WISCONSIN POTAWATOMIES OF THE
HANNAHVILLE INDIAN COMMUNITY OF MICHIGAN

WHITE MOUNTAIN APACHE TRIBE OF ARIZONA

ASSOCIATION OF
VILLAGE COUNCIL PRESIDENTS (YUPIK ESKIMOS)

KODIAK AREA NATIVE ASSOCIATION (ALEUT)

TANANA CHIEFS CONFERENCE (ATHABASCAN)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

MOTION 1

INTEREST OF *AMICI CURIAE* 2

ARGUMENT

I. The Texas Courts Below Lacked Subject Matter Jurisdiction To Either Terminate The Parent-Child Relationship Or To Appoint A Conservator In This Case 4

II. The Decisions Below Deny Petitioner The Fundamental Constitutional Right To Raise Her Family According To Rosebud Sioux Familial And Cultural Traditions 12

CONCLUSION 16

TABLE OF AUTHORITIES

Cases:

American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1975) 4

Bradley v. Richmond School Board, 416 U.S. 696 (1974) 10

Bryan v. Bryan, 477 S.W.2d 705 (Tex. 1972) 4

Carey v. Population Services International, 431 U.S. 678 (1977) 14

City of Kenosha, Wisconsin v. Bruno, 412 U.S. 507 (1973) 4

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 14

Cort v. Ash, 422 U.S. 66 (1975) 10

DeCoteau v. District Court, 420 U.S. 425 (1975) 6, 8, 11

Cases, continued: Page

Fisher v. District Court, 424 U.S. 382, 387-388 (1976) 5, 6, 11

Griswold v. Connecticut, 381 U.S. 479 (1965) 14

Haase v. Greutzmacher, 521 S.W.2d 666 (Tex. 1975) 4

In re Buehl, 87 Wash.2d 649, 555 P.2d 1334 (1976) 6, 8, 11

In re Colwash, 57 Wash.2d 196 (1960), 356 P.2d 994 (1960) 6

In re Doe, 89 N.M. 606, 555 P.2d 906 (1976) 6, 8, 11

In re Duryea, 115 Ariz. 86, 563 P.2d 885 (1977) 6, 8, 11

In re Greybull, 23 Or. App. 674, 543 P.2d 1079 (1975) 6, 8, 11

In re Lelah-Pu-Ka Chee, 98 F. 429 (N.D. Iowa 1899) 6

Live Oak County v. Lower Nueces River Water Supply District, 446 S.W.2d 14 (Tex. 1969) 4

McClanahan v. Arizona State Tax Commissioner, 411 U.S. 164 (1973) 5

Meyer v. Nebraska, 262 U.S. 390 (1923) 14

Mitchell v. Maurer, 293 U.S. 237 (1934) 4

Moore v. City of East Cleveland, Ohio, 431 U.S. 158 (1944) 14

Phillips Petroleum Co. v. Bivins, 423 S.W.2d 341 (Tex. 1961) 4

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 14

Prince v. Massachusetts, 32 U.S. 390 (1923) 14

Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670 (1978) 5

Sosna v. Iowa, 419 U.S. 393 (1975) 4

State v. Superior Court, 57 Wash.2d 818, 356 P.2d 985 (1960) 6

Cases, continued: Page

Thorpe v. Durham Housing Authority, 393 U.S. 268 (1969) 10

United States v. Quiver, 241 U.S. 602 (1916) 5

United States v. Schooner Peggy, 1 Cranch 103 (1801) 10

Wakefield v. Littlelight, 276 Md. 333, 347 A.2d 228 (1975) 6, 7, 8, 11

Williams v. Lee, 358 U.S. 217 (1959) 5

Wisconsin v. Yoder, 406 U.S. 205 (1972) 14

Wisconsin Potawatomies, etc. v. Houston, 393 F. Supp. 719 (W.D. Mich. 1973) 6, 7, 8, 11

Worcester v. Georgia, 31 U.S. 515 (1832) 4, 5

Statutes:

25 U.S.C. § 1901 *et seq.* (1978) 8, 9, 10, 15

Other Authorities:

RESTATEMENT (Second) OF CONFLICTS § 22, Comment & Illustration 1 (1971) 11

Wright, Miller, Cooper & Gressman, *Federal Rules of Practice and Procedure:* § 1393 (1977) 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

No. 78-25

BERNADINE ROSE BROKENLEG,

Petitioner,

v.

BERNARD C. BUTTS, SR., *et ux.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE STATE OF TEXAS, EL PASO

MOTION FOR LEAVE TO PROCEED *AMICI CURIAE* BY THE NATIONAL INDIAN YOUTH COUNCIL., INC., CROW TRIBE OF INDIANS OF MONTANA, ONEIDA NATION OF NEW YORK AND BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

(additional Amici appear inside)

MOTION

Ellen W. Leitzer, attorney for *amici curiae*, National Indian Youth Council, Inc., Crow Tribe of Indians of Montana, Oneida Nation of New York, Sisseton-Wahpeton Sioux Tribe of North Dakota and South Dakota, Wisconsin Potawatomies of the Hannahville Indian Community of Michigan, White Mountain Apache Tribe of Arizona, Association of Village Council Presidents (Yupik Eskimos), Kodiak Area Native Association (Aleut), Tan-

ana Chiefs Conference (Athabascan), hereby respectfully moves for leave to file the attached brief *amici curiae* in support of the Petition for Writ of Certiorari to the Court of Civil Appeals of the State of Texas, El Paso, in the above captioned action. Counsel for Petitioner has consented to the filing of this brief.* Counsel for Respondents has refused consent.

Amici contend, *inter alia,* that the Texas courts below lacked subject matter jurisdiction to either terminate the parent-child relationship or to appoint a conservator in this case. See Argument I, *infra.* Neither party to this litigation has raised this jurisdictional issue at any stage of the proceedings. It is crucial that this Court resolve the underlying jurisdictional question raised by *amici* prior to resolving other procedural and substantive issues raised by the parties herein. The interest of *amici curiae* in this proceeding is more specifically set out below.

INTEREST OF *AMICI CURIAE*

The National Indian Youth Council, Inc. (NIYC), is a national non-profit organization established in 1961. Among its objectives is to foster and promote nationwide interest and concern for the problems of American Indians to the end that racial tensions, prejudice and discrimination, economic and otherwise, may be eliminated and the valuable cultural heritage of the American Indian may be preserved and protected. Historically, NIYC has been particularly interested in issues affecting Indian youth.

The Wisconsin Potawatomies of the Hannahville Indian Community of Michigan, Sisseton-Wahpeton Sioux Tribe of North Dakota and South Dakota, Crow Tribe of

*The letter of consent is on file with the Clerk of the Court.

Indians of Montana, White Mountain Apache Tribe of Arizona, and Oneida Nation of New York are American Indian Tribes.

The Association of Village Council Presidents represents the Yupik Eskimos in fifty-six Alaska Native Villages.

The Kodiak Area Native Association represents the Aleuts of Kodiak Island, Alaska.

The Tanana Chiefs Conference represents the Athab Ascan Indians in forty-two Alaska Native Villages.

Over many years and under circumstances similar to those of the case at bar *amici* and its members and constituents (NIYC) have been the targets and victims of the same racial prejudice and cultural degradation that underlie the decisions of the Texas courts below. Such decisions have resulted in the unwarranted destruction of many Native American families and communities. To combat this reality, *amici* vigorously supported the enactment of the Indian Child Welfare Act, P.L. 95-608. The Act which essentially codifies prior court decisions, including decisions of this Court, provides an expanded tribal jurisdiction to determine the type of custody issues involved here.

Amici seek to participate in urging reversal of the decisions below in order to secure due process and equal protection for Native American families under standards that are racially and culturally nondiscriminatory. Additionally, *amici* seek to establish that Native America judicial forums should have exclusive jurisdiction under the Indian Child Welfare Act and prior judicial decisions to determine the custody of children domiciled on Indian reservations.

ARGUMENT

This case is not a typical child custody matter. Rather, at issue are questions of Indian sovereignty which have not been raised by the parties to this litigation at any stage of the proceedings.

I.

THE TEXAS COURTS BELOW LACKED SUBJECT MATTER JURISDICTION TO EITHER TERMINATE THE PARENT-CHILD RELATIONSHIP OR TO APPOINT A CONSERVATOR IN THIS CASE

The Texas courts below erred in asserting subject matter jurisdiction over this action and it is appropriate for this Court to consider the jurisdictional issue at this stage of the proceedings.[1]

This Court has long recognized the sovereignty of Indian nations and their right to regulate matters arising within the boundaries of their reservations. *Worcester v.*

[1] It is well established law that the lack of subject matter jurisdiction is never waived by either express consent, conduct, or estoppel. Wright, Miller, Cooper & Gressman, *Federal Rules of Practice and Procedure:* Jurisdiction § 1393 (1977); *Sosna v. Iowa*, 419 U.S. 393 (1975); *Mitchell v. Maurer*, 293 U.S. 237 (1934); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951). Moreover, a court may take notice of the lack of subject matter jurisdiction at any stage of the proceedings on its own or upon the motion of a party. Wright, Miller, Cooper & Gressman, *supra*; *City of Kenosha, Wisconsin v. Bruno*, 412 U.S. 507 (1973). Texas law follows federal procedural law in this area. *Live Oak County v. Lower Nueces River Water Supply Dist.*, 446 S.W.2d 14 (Tex. 1969); *Phillips Petroleum Co. v. Bivins*, 423 S.W.2d 341 (Tex. 1961); *Haase v. Greutzmacher*, 521 S.W.2d 666 (Tex. 1975); *Bryan v. Bryan*, 477 S.W.2d 705 (Tex. 1972).

Georgia, 31 U.S. 515 (1832); *United States v. Quiver*, 241 U.S. 602 (1916). More recently the Court has modified the broad principles of *Worcester, supra*, and its progeny to permit states to act concerning matters arising on a reservation but only where "essential tribal relations were not involved and where the rights of Indians would not be jeopardized," *Williams v. Lee*, 358 U.S. 217, 219-220 (1959). The so-called Williams test requires a court to determine whether the assertion of the state's interest in the occurrence infringes upon the tribal right to self-government. *Williams, supra* at 228. Accord, *McClanahan v. Arizona State Tax Commissioner*, 411 U.S. 164 (1973). Most recently the Court, in *Santa Clara Pueblo v. Martinez*, 98 S. Ct. 1670, 1677 (1978), reiterated the basic *Worcester* principle that: "subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves," *Fisher v. District Court*, 424 U.S. 382, 387-388 (1976), "may undermine the authority of the tribal court[s] ... and hence ... infringe on the right of the Indians to govern themselves." *Williams v. Lee, supra*, 358 U.S. at 223.

In 1976 the Court decided *Fisher v. District Court, supra*, a case involving the jurisdiction of the State of Montana over an adoption proceeding where all parties were residents of the Northern Cheyenne Indian Reservation and enrolled members of the tribe, and where no substantial part of conduct supporting the adoption petition took place off the reservation. The Court applied the principles enunciated in *Worcester, supra, Williams, supra*, and *McClanahan, supra*, and held that the Northern Cheyenne Tribal Court has exclusive jurisdiction over the adoption proceedings in this instance. The *Fisher* decision recognizes that Indian

self-determination includes the right of Indian tribes to resolve matters affecting the parent-child relationship where the parties are all residents of the tribal reservation in question. cf., *DeCoteau v. District Court*, 420 U.S. 425 (1975).

Other courts have applied the principles enunciated in the *Fisher* decision, *supra*, to reach similar results. *In re Lelah-Pu-Ka Chee*, 98 F. 429 (N.D. Iowa 1899); *State v. Superior Court*, 57 Wash.2d 818, 356 P.2d 985 (1960); *In re Colwash*, 57 Wash.2d 196 (1960), 356 P.2d 994 (1960). Indeed, several courts have applied the reasoning of the *Fisher* Court to a different set of facts to hold that not only does a tribal court possess exclusive jurisdiction to adjudicate custody matters pertaining to parties who reside on the reservation but, additionally, the tribal court has exclusive jurisdiction over custody matters involving Indian children who are members of a recognized tribe and who reside off the reservation but who continue to be domiciled on the reservation. *Wisconsin Potawatomies, etc. v. Houston*, 393 F. Supp. 719 (W.D. Mich. 1973); *Wakefield v. Littlelight*, 276 Md. 333, 347 A.2d 228 (1975); *In re Buehl*, 87 Wash.2d 649, 555 P.2d 1334 (1976). *Accord, In re Greybull*, 23 Or. App. 674, 543 P.2d 1079 (1975); *In re Doe*, 89 N.M. 606, 555 P.2d 906 (1976); *In re Duryea*, 115 Ariz. 86, 563 P.2d 885 (1977). At issue in *Wisconsin Potawatomies, supra, Wakefield, supra*, and *Buehl, supra*, was whether state courts had jurisdiction over custody proceedings involving Indian children who were residing off the reservation, but whose parent(s) continued to be domiciled on the reservation. The *Wisconsin Potawatomies* court, *supra*, clearly articulated the basic premise of *Fisher, supra, Wakefield, supra, Buehl, supra*, and *Greybull, supra*:

> If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, a *sine qua non* to the preservation of its identity. *Wisconsin Potawatomies, supra* at 730.

Under the "Williams test" the intervention by state courts in matters concerning the custody of Indian children was viewed as a grave threat to tribal sovereignty:

> . . . there can be no greater threat to "essential tribal relations," and no greater infringement on the right of the . . . [t]ribe to govern themselves than to interfere with tribal control over the custody of their children. . . . *Wakefield, supra* at 237-238.

Implicit in the *Wisconsin Potawatomies, Wakefield,* and *Buehl* decisions is the recognition by those courts that the vast majority of Indian children who had been separated from their Indian families and communities (through both legal and illegal actions) reside with non-Indian families. Often these chidren reside in states other than where their tribal reservations are located. It was crucial, therefore, to apply jurisdictional criteria other than the residence of the parties on the reservation, so that the tribe could preserve its identity and retain its sovereignty.[2] The essential criterion established was domicile of the child:

> By using the Indian child's domicile as the state's jurisdictional basis, the Indian tribe is afforded significant protection from losing its essential rights

---

[2] In most states the physical presence of a child in the state is sufficient to satisfy the jurisdictional requirement. However, different criteria have been established for Indian children because of the unique status of Indian people in American society and the threat to tribal identity. See Argument II, *infra*.

of child-rearing and maintenance of tribal identity. *Wakefield, supra* at 238.

In *Wisconsin Potawatomies, Wakefield,* and *Buehl,* the parent upon whom the child's domicile was contingent remained domiciled on the Indian reservation at all times. Moreover, the children who were the subject of the litigation had also resided on the reservation although, at the time of the litigation, they had been residing off the reservation for substantial periods of time and even in states other than where their Indian reservations were located. *Wakefield, supra; Buehl, supra.* See *Greybull, supra, Doe, supra,* and *Duryea, supra,* where the courts accepted the validity of the domicile approach but determined that the children who were the subject of the litigation were not domiciled on the reservation. Nor is the Court's decision in *DeCoteau, supra,* dispositive of the jurisdictional issue presented in this case. *DeCoteau* cannot be properly characterized as an Indian child custody jurisdictional case. Rather, it is a reservation disestablishment case. Nevertheless, the *DeCoteau* Court never reached the jurisdictional issue, but merely decided that the land in question was not an Indian reservation.

The results reached in *Wisconsin Potawatomies, Wakefield,* and *Buehl,* and concurred to in *Greybull, Doe* and *Duryea,* have recently been endorsed by the United States Congress in enacting the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.* (1978), which was signed into law by President Carter on November 8, 1978. In enacting this legislation Congress responded to the alarming trend which has threatened and continues to threaten the survival of Indian communities in the United States—the unwarranted intrusion into Indian family life and the removal of Indian children at alarming rates by public and private agencies, and occasionally sanctioned by

some courts.[3] The legislative history of the Indian Child Welfare Act reflects that Congress is concerned that the high rate of separation of Indian children from their families and communities is the result of a cultural bias that Indian people would be better off living in a non-Indian setting.[4]

By establishing minimum federal standards for the removal of Indian children from their communities it is the intent of Congress "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families," § 3, 25 U.S.C. § 1902 (1978). Several provisions of the Act are relevant to the present litigation. Specifically, § 101(a), 25 U.S.C. § 1911 (1978), provides:

> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.[5]

---

[3] See Argument II, *infra.*

[4] See generally legislative history of S. 1214 which includes: H.R. Rept. No. 95-1386, 95th Cong., 2d Sess. (1978); S. Rept. No. 95-597, 95th Cong., 1st Sess. (1977); Indian Child Welfare Act of 1977, Hearing Before the Select Committee on Indian Affairs, United States Senate, 95th Cong., 1st Sess. (1977); Task Force Four Report on Federal State and Tribal Jurisdiction, Report to the American Indian Policy Review Commission, 94th Cong., 2d Sess. (1976); and, Indian Child Welfare Program, Oversight Hearing Before the Subcommittee on Indian Affairs, United States Senate, 93rd Cong., 2d Sess. (1974).

[5] While most of the provisions of § 25 U.S.C. § 1901 *et seq.* (1978) do not become effective until May 7, 1978, § 101(a), 25

[footnote continued]

And, § 110, 25 U.S.C. § 1920 (1978), provides:

> Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

Given this background, it is clear that the Texas courts below erred in asserting subject matter jurisdiction over this action. The record before this Court shows that in 1971 Petitioner's marriage to Bernard C. Butts, Jr., was annulled because Petitioner learned that her "husband's" marriage to his first wife had not been legally terminated, and Petitioner assumed legal custody of their eighteen months old child, Tiffany. Testimony of Bernadine Rose Brokenleg, Statement of Facts, page 63. Subsequently, Petitioner and her child moved to the Rosebud Sioux Indian Reservation where they are both enrolled members of the Rosebud Sioux Tribe. Petitioner's Brief for Certiorari at 3. Tiffany lived with her mother on the reservation from May, 1972 until July, 1973 when Bernard C. Butts, Jr., and his parents removed the child

---

U.S.C. §1911 is currently in effect. Section 113, 25 U.S.C. §1923. Clearly, the Court should take into consideration this provision of the Indian Child Welfare Act in reaching a decision on the jurisdictional issue in question. *Cort v. Ash*, 422 U.S. 66, 77 (1975); *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974); *Thorpe v. Durham Housing Authority*, 393 U.S. 268, 282 (1969); *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801).

from the reservation, *Brokenleg v. Butts*, 559 S.W.2d 853, 855 (Tex. Civ. App.-El Paso 1977). Petitioner has continuously resided on the Rosebud Sioux Reservation since May, 1972. 559 S.W.2d at 855.

Domicile of an Indian child is the exclusive criterion for determining whether a state court or a tribal court has jurisdiction over matters affecting the parent-child relationship. *Wisconsin Potawatomies, supra; Wakefield, supra; Buehl, supra; Indian Child Welfare Act, supra.* See *Fisher, supra; DeCoteau, supra; Greybull, supra; Doe, supra; Duryea, supra.* And, regardless of state law to the contrary, *Wakefield, supra* at 237.

The general rule is that the domicile of a child upon divorce or separation is the same as that of the parent who obtains legal custody of the child. RESTATEMENT (Second) OF CONFLICTS § 22, Comment & Illustration 1 (1971). Logically, the rule to determine domicile of a child upon annulment follows that for divorce or separation. Tiffany's domicile is contingent upon the domicile of her mother. Despite Tiffany's physical presence in Texas, she continues to be domiciled on the Rosebud Sioux Indian Reservation. As a domiciliary of the Rosebud Sioux Indian Reservation, and in accordance with the decisions of this Court and the courts cited above, and reaffirmed by recent Congressional mandate, the Texas courts below lacked subject matter jurisdiction over this action. The Rosebud Sioux Tribal Court possesses exclusive jurisdiction in matters relating to the custody of Tiffany Butts.

II.

THE DECISIONS BELOW DENY PETITIONER THE FUNDAMENTAL CONSTITUTIONAL RIGHT TO RAISE HER FAMILY ACCORDING TO ROSEBUD SIOUX FAMILIAL AND CULTURAL TRADITIONS

The Court of Civil Appeals rejected all of the District Court's abandonment and neglect findings but nevertheless affirmed the district Court's custody award on the ground that Respondents have "a more stable home" than Petitioner, *Brokenleg v. Butts,* 559 S.W.2d at 857, a "fact" not expressed by the District Court. Indeed, the Court of Civil Appeals appears to be merely restating the District Court's Findings of Fact 6 and 7, only in a more acceptable manner. See Findings of Facts and Conclusions of Law, Appendix D, Petitioner's Brief for Certiorari at 22a-24a. The insensitivity towards Indian familian and cultural traditions manifested by the statements of the courts below is not unique. The legislative history to the Indian Child Welfare Act is replete with examples of the removal of Indian children from their families and communities by public and private agencies because these agencies have no way to evaluate intelligently the cultural and societal premises underlying Indian home life.[6] Additionally, these agencies are either ignorant of Indian cultural traditions or contemptuous of them.[7] The racial bias exhibited by non-Indian social workers has resulted in the separation of Indian children from their families at an alarming rate.[8] The Association on American Indian

[6] See generally Indian Child Welfare Act of 1977, Hearing on S. 1214 before the United States Senate Select Committee on Indian Affairs, 95th Cong., 1st Sess. (Aug. 4, 1977).

[7] *Id.*

[8] *Id.*

Affairs (hereinafter referred to as AAIA) has conducted in recent years statistical surveys documenting the extent of this threat to the survival of Indian communities in the United States. In 1969 and 1974 surveys in states with large Indian populations[9] revealed that twenty-five percent to thirty-five percent of all American Indian children are separated from their families and reside in foster homes, adoptive homes or institutions.[10] Moreover, in the sixteen states AAIA surveyed in 1969[11] approximately eight-five percent of all American Indian children in foster homes were living with non-Indian couples.[12] The comparison of rates of removal of Indian children from their families as contrasted with the rates of removal of non-Indian children from their families reveals another shocking statistic. An AAIA 1976 survey, conducted at the request of the American Indian Policy Review Commission, an agency of the United States Congress, shows that, for example, in Maine the per capita rate for foster placement is nineteen times greater for Indian than for non-Indian children and of these placements, sixty-four percent are with non-Indian families.[13] The ratio of American Indian foster care placement in Minnesota is at least seventeen times greater

[9] The states surveyed included: Oklahoma, Arizona, Minnesota, South Dakota, Washington, and Wisconsin.

[10] Hearing on S. 1214, *supra* note 6, at 187 (Statement of Rena Uviller).

[11] The states surveyed included: Alaska, Arizona, California, Idaho, Michigan, Minnesota, Montana, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wisconsin.

[12] H.R. Rep. No. 1386, 95th Cong., 2nd Sess. at 9 (1978).

[13] Hearing on S. 1214, *supra* note 6, at 565 (Appendix G, AAIA Statistical Survey).

than for non-Indians,[14] and in South Dakota it is approximately twenty-two times greater.[15] In a study conducted on a North Dakota Indian reservation it was reported that non-Indian social workers removed Indian children from their families for reasons of "child abuse" in only one percent of the cases and for the remaining ninety-nine percent such vague grounds as "neglect" or "social deprivation" were cited.[16] Children were labeled "neglected" if, for example, they were left for a period of time with a member of the extended family, a commonplace childrearing practice sanctioned and encouraged by the Indian community.[17] Methods of discipline among Indian people also vary from those understood by non-Indian social workers and Indian parents are penalized by having their children removed from them because they are too "permissive."[18]

The Court has recognized the fundamental rights of parents to raise their offspring in accordance with their own convictions and precepts. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 32 U.S. 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). See also *Moore v. City of East Cleveland, Ohio*, 431 U.S. 158 (1944); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Carey v. Population Services International*, 431 U.S. 678 (1977). These decisions construe this fundamental right of parents as both a concept of personal liberty and

[14] *Id.* at 570-571.

[15] *Id.* at 592-593.

[16] H.R. Rep. No. 1386, *supra* note 12, at 10.

[17] *Id.*

[18] *Id.*

privacy protected by the Due Process Clause from governmental intrusion absent a compelling reason. The removal of Indian children from their families whether by non-Indian social workers or by non-Indian courts where the sole motivation is one of racial bias is to deny those Indian families of the fundamental constitutional right to raise their children according to traditional familial and cultural values.

It is precisely this personal liberty or privacy interest which Congress appears to be attempting to protect in enacting the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.* (1978). And, it is precisely this right of personal liberty or privacy which the Texas courts, in the instant action, chose to ignore by refusing to return Tiffany to Petitioner. Implicit in the decisions of the courts below is the belief that all children are better off growing up in a non-Indian setting and, especially, if a child exhibits non-Indian physical features, regardless of the child's Indian blood and tribal membership. The decisions of the Texas courts, to award Tiffany's custody to her non-Indian paternal grandparents evidence a contempt for Indian society and cultural values and in so doing intrudes on Petitioner's fundamental right to raise her child according to the traditions and customs of the Rosebud Sioux Indian society. Nor is any compelling state interest advanced by the Texas courts to justify the intrusion, such as the unfitness of Petitioner. See Findings of Facts and Conclusions of Law, Appendix D, Petitioner's Brief for Certiorari at 22a-24a; and, 559 S.W.2d at 857. Indeed, the racial overtones and cultural bias exhibited by the courts below was cited as an example of the necessity for enacting the Indian Child Welfare Act by Representative Morris Udall during his

speech on the floor of the United States House of Representatives in which he urged passage of the Act. 124 *Cong. Rec.* H12,849 (daily ed. Oct. 14, 1978).

CONCLUSION

Since the courts below lacked subject matter jurisdiction over this action pursuant to principles of Indian sovereignty law as interpreted by case law and recent Congressional mandate or, in the alternative, because the decisions below interfere with Petitioner's fundamental constitutional right to raise her child according to Rosebud Sioux familial and cultural traditions this Court is urged to issue a writ of certiorari to the Court of Civil Appeals of Texas, El Paso and also to reverse summarily the custody decision of that court and the District Court.

Respectfully submitted,

ELLEN W. LEITZER
NATIONAL INDIAN YOUTH COUNCIL, INC.
201 Hermosa, N.E.
Albuquerque, New Mexico 87108
Attorney for Amici Curiae